UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARCH SPECIALTY INSURANCE COMPANY,

Plaintiff,

-against-

FARM FAMILY INSURANCE COMPANY,

Defendant.

Docket No. 15-CV-10069 (LTS)

MEMORANDUM OF LAW IN SUPPORT OF ARCH SPECIALTY INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT AND TO STAY PROCEEDINGS

KELLY & CURTIS, PLLC
Attorneys for Plaintiff
ARCH SPECIALTY INSURANCE COMPANY
32 Broadway, Suite 301
New York, New York 10004
(212) 248-2200

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS 2

A. Construction Contract Between Mega and Mastercraft 2

B. The Farm Family Insurance Policy 4

C. The Underlying Action 5

D. Arch's Repeated Tenders to Farm Family 6

E. The Declaratory Judgment Action 7

ARGUMENT 8

I. ARCH IS ENTITLED TO SUMMARY JUDGMENT ON ALL ITS CLAIMS 8

A. Standards for Motion for Summary Judgment 8

B. The Tendering Parties are Additional Insureds Under the Farm Family Policy and are Entitled to a Defense and Indemnification in the Underlying Action 9

C. The Tendering Parties Qualify as Additional Insureds On the Farm Family Policy and Farm Family Has No Basis to Deny Them Defense and Indemnification 10

II. THE COURT SHOULD STAY THE ACTION AS THE MOTION FOR SUMMARY JUDGMENT WILL OBVIATE ENTIRELY THE NECESSITY OF A TRIAL IN THIS MATTER 14

CONCLUSION 16

TABLE OF AUTHORITIES

Page

Cases

Anthracite Capital BOFA Funding, LLC v. Knutson,
2009 U.S. Dist. Lexis 112551 (S.D.N.Y. Dec. 3, 2009) 14

Auriemma v. Biltmore Theatre, LLC,
82 A.D.3d 1, 917 N.Y.S.2d 130 (1st Dept. 2011) 12

Burlington Ins. Co. v. NYC Tr. Auth.,
132 A.D.3d 127, 14 N.Y.S.3d 377 (1st Dept. 2015) 13, 14

Celotex Corp. v. Catrett,
477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) 8

Chelsea Assocs. LLC v. Laquila–Pinnacle,
21 A.D.3d 739, 801 N.Y.S.2d 15 (1st Dept. 2005) 13

Consol. Edison Co. of N.Y., Inc. v. Allstate Ins. Co.,
98 N.Y.2d 208, 220, 746 N.Y.S.2d 622 (2002) 9

Gallo v. Prudential Residential Servs., Ltd. Partnership,
22 F.3d 1219, 1224 (2d Cir. 1994) 8

HBE Corp. v. Harleysville Grp., Inc.,
2015 U.S. Dist. LEXIS 131972 (N.D.N.Y. Sept. 30, 2015) 11

Hotels AB, LLC v. Permasteelisa, CS,
2013 N.Y. Misc. LEXIS 4154 (N.Y. Sup. Ct. Sept. 11, 2013) 10

Hotel Employees & Rest. Employees Union, Local 100 of New York, N.Y.
& Vicinity, AFL-CIO v. City of New York Dep't of Parks & Recreation,
311 F.3d 534, 543 (2d Cir. 2002) 8

Hunter Roberts Const. Group, LLC v. Arch Ins. Co.,
75 A.D.3d 404, 904 N.Y.S.2d 52 (1st Dept. 2010) 11, 13

Kel-Mar Designs, Inc. v. Harleysville Ins. Co. of N.Y.,
127 A.D.3d 662, 8 N.Y.S.3d 304 (1st Dept. 2015) 12, 14

Liberty Mut. Ins. Co. v. Zurich Am. Ins. Co.,
2014 U.S. Dist. LEXIS 42471 (S.D.N.Y. March 28, 2014) 9, 14

Longwood Central School District v. American Employer's Ins. Co., 35 A.D.3d 550, 827 N.Y.S.2d 194 (2d Dept. 2006) 12

Maroney v. New York Cent. Mut. Fire Ins. Co., 5 N.Y.3d 467, 472, 805 N.Y.S.2d 533 (N.Y. 2005) 11

Ment Bros Iron Works Co., Inc. v. Interstate Fire & Cas. Co., 702 F.3d 118, 121 (2d Cir. 2012) 9

National Union Fire Ins. Co. of Pittsburgh, PA v. Greenwich Ins. Co., 103 A.D.3d 473, 962 N.Y.S.2d 9 (1st Dept. 2013) 10

National Union Fire Ins. Co. of Pittsburgh, Pa. v. Walton Ins. Ltd., 696 F.Supp. 897, 900 (S.D.N.Y. 1988) 8

Regal Constr. Corp. v. National Union Fire Ins. Co. of Pittsburgh, PA, 15 N.Y.3d 34, 904 N.Y.S.2d 338 (N.Y. 2010) 10, 11

Sandy Creek Cent. School Dist. v. United Nat. Ins. Co., 37 A.D.3d 812, 831 N.Y.S.2d 465 (2d Dept. 2007) 13

Strauss Painting, Inc. v. Mt. Hawley Ins. Co., 105 A.D.3d 512, 963 N.Y.S.2d 197 (1st Dept. 2013) 11

Shawmut Woodworking & Constr. v. Harleysville Ins. Co. of N.Y., 2014 N.Y. Misc. LEXIS 972 (N.Y. Sup. Ct. Mar. 6, 2014) 10

Turner Construction Co. v. Pace Plumbing Corp., 298 A.D.2d 146, 748 N.Y.S.2d 356 (1st Dept. 2002) 13

W & W Glass Sys., Inc. v. Admiral Ins. Co., 91 A.D.3d 530, 937 N.Y.S.2d 28 (1st Dept. 2012) 10, 14

Wausau Underwriters Ins. Co. v. Old Republic Gen. Ins. Co., 2015 U.S. Dist. LEXIS 103954 (S.D.N.Y. Aug. 7, 2015) 11

Worth Constr. Co., Inc. v. Admiral Ins. Co., 10 N.Y.3d 411, 416, 859 N.Y.S.2d 101 (N.Y. 2008) 11

Zurich Am. Ins. Co. v. Burlington Ins. Co., 2016 N.Y. Misc. Lexis 1129 (N.Y. Sup. Ct. April 4, 2016) 12

Statutes

Fed. R. Civ. P. 26 .... 1, 2, 14

Fed. R. Civ. P. 56 .... 1, 8

Plaintiff Arch Specialty Insurance Company ("Arch"), by its attorneys KELLY & CURTIS, PLLC, submits this Memorandum of Law in support of Arch's motion for summary judgment, pursuant to Fed. R. Civ. P. 56, against defendant Farm Family Casualty Insurance Company (s/h/a Farm Family Insurance Company) ("Farm Family"), and for an order, pursuant Fed. R. Civ. P. 26, staying all discovery and relevant deadlines set forth in this Court's March 11, 2016 Pre-Trial Scheduling Order ("Scheduling Order") pending adjudication of the within motion for summary judgment.

PRELIMINARY STATEMENT

In this declaratory judgment action Arch seeks an Order declaring: (1) Mega Contracting Group, LLC ("Mega"), East 138th Street Owners LLC ("East 138th Street") and Barrier Free Living Housing Development Fund Corporation ("Barrier Free Living") (collectively, "Tendering Parties") qualify as additional insureds on a general liability insurance policy issued by Farm Family to Mastercraft Masonry I, Inc. ("Mastercraft"), with respect to an underlying action captioned Joseph A. Giampa v. Barrier Free Living Housing Development Fund Corporation, et al., pending in the Supreme Court of the State of New York, County of Bronx, under Index No. 22943/2015E ("underlying action"); (2) Farm Family has an obligation to defend and indemnify the Tendering Parties in the underlying action; and (3) Farm Family must reimburse Arch for the monies it has expended and will continue to expend on the defense and indemnity of the Tendering Parties in the underlying action. Arch also seeks a money judgment in the amount of $29,744.02 in favor of Arch against Farm Family.

As more fully set forth below, the existence of insurance coverage available to the Tendering Parties as additional insureds on the Farm Family policy issued to Mastercraft is a matter of law for the Court to determine. In this instance, the documentary evidence unequivocally establishes that the Tendering Parties are additional insureds on the Farm Family insurance policy. These parties qualify as additional insureds on the Farm Family policy if their liabilities were caused, in whole or in part, by Mastercraft's acts or omissions in the performance of its ongoing operations. The plaintiff in his complaint in the underlying action expressly alleges that he was injured during the course of his employment with Mastercraft. Under New York law, the additional insured's liabilities will be deemed to have been caused by Mastercraft's acts or omissions in the performance of its ongoing operations by the mere fact that the plaintiff's injuries were sustained in the course of his employment with Mastercraft. Accordingly, Farm Family has an obligation to defend and indemnify the Tendering Parties.

This Memorandum of Law is additionally submitted in support of Arch's motion for an Order pursuant Fed. R. Civ. P. 26, staying all discovery and relevant deadlines set forth in the Scheduling Order pending adjudication of the within motion for summary judgment. Inasmuch as a favorable decision on Arch's motion for summary judgment would obviate the necessity of a trial in this matter, a stay is just and appropriate.

STATEMENT OF FACTS

The relevant facts are set forth at length in the Affidavit of Matthew J. Vinciguerra, sworn to on the 18th day of July 2016 ("Vinciguerra Aff."), and the Declaration of Adam B. Curtis, dated July 19, 2016 ("Curtis Dec."), and the exhibits annexed thereto, submitted in support of Arch's motion for summary judgment and stay, and are only repeated herein as may be necessary for clarity and convenience of the Court.

A. Construction Contract Between Mega and Mastercraft

On or about May 31, 2013, Mastercraft, as subcontractor, entered into a contract with Mega, as contractor ("Mastercraft Contract"), pursuant to which Mastercraft agreed to perform services as the masonry subcontractor at a construction site located at 616 East 139th Street, Bronx, New York ("project site"). (A copy of the Mastercraft Contract is attached to the Vinciguerra Aff. as Exhibit "3"). East 138th Street and Barrier Free Living were the owners of the project site.

Pursuant to Paragraph 34 of the Mastercraft Contract, Mastercraft agreed to defend, indemnify and save harmless Mega, East 138th Street and Barrier Free Living, and their members, officers, agents, servants and employees against any and all claims for bodily injury, and the costs and expenses associated therewith, including those brought by employees of Mastercraft and its subcontractors, arising out of or in any way related to the performance of operations under the Mastercraft Contract, and to reimburse the reasonable attorneys' fees, and other costs and expenses of such claims, including the costs of enforcing the indemnification obligation. Paragraph 34 of the Mastercraft Contract states, in pertinent part:

> The Subcontractor hereby assumes entire responsibility and liability for any and all damages or injury of any kind whatever (including death resulting therefrom) to all persons, whether employees of the Subcontractor or otherwise, and to all property caused by, resulting from, arising out of, or occurring in connection with the execution of the Work.

Pursuant to Paragraph 35(C)(ii) of the Mastercraft Contract, Mastercraft was required to procure and maintain a comprehensive general liability policy providing limits of $1 million per occurrence and $2 million in the aggregate. Mastercraft was additionally obligated to include the Tendering Parties as additional insureds on its insurance coverage on a primary basis. Paragraph 35(D) of the Mastercraft Contract states, in pertinent part:

> Mega Contracting Group, LLC and the other Indemnitees *shall be named as additional insureds on a primary basis* to the Subcontractor's Comprehensive General Liability using appropriate ISO forms that include Premises Operations Liability, Contractual Liability, Advertising and Personal Injury Liability and Products/Completed Operations Liability, or by using a company specific endorsement that provide equivalent protection.

(emphasis supplied).

B. The Farm Family Insurance Policy

Mastercraft obtained from Farm Family a general liability insurance policy numbered 3101X3860, effective October 22, 2013 to October 22, 2014, and providing limits of $2 million per occurrence and $4 million in the aggregate ("Farm Family Policy"). (A copy of the Farm Family Policy is attached to the Vinciguerra Aff. as Exhibits "4" and "5"). The Farm Family Policy explicitly identifies and separately lists Barrier Free Living, East 138th Street and Mega as additional insureds in its Additional Insureds Schedule. (A copy of the Farm Family Policy Additional Insureds Schedule is included in Exhibits "4" and "6" attached to the Vinciguerra Aff.). Barrier Free Living was explicitly added, named and designated as an additional insured by an Additional Insured – Designated Person or Organization endorsement to the Farm Family Policy, and East 138th Street and Mega were explicitly and separately added, named and designated as additional insureds by Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization endorsements to the Farm Family Policy. (Copies of the Farm Family Policy Additional Insured endorsements for the Tendering Parties are attached to the Vinciguerra Aff. as Exhibit "6").

Each Additional Insured endorsement provides, in pertinent part,[1]

The following is added to Paragraph C. **Who is An Insured in Section II – Liability**:

3. Any person(s) or organization shown in the Schedule is also an additional insured, but only with respect to liability for "bodily injury, "property damage," or "personal and advertising injury" caused, in whole or in part, by"

   a. Your acts or omissions; or

[1] Very slight differences exist between the content and formatting of the Barrier Free Living and the East 138th Street and Mega Additional Insured endorsements. These differences are entirely non-material to the resolution of this action. The Court is nevertheless respectfully referred to each Additional Insured endorsement for its terms and conditions contained therein. (Vinciguerra Aff., Exhibits "4" and "6").

b. The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured(s) at the locations(s) designated above.

The Farm Family Policy is further subject to a Primary and Noncontributory Insurance endorsement which specifically provides, in pertinent part:

A. PRIMARY AND NONCONTRIBUTORY INSURANCE CONDITION

1. Where required by contract or agreement executed by the parties to that contract or agreement, this insurance is primary and/or noncontributory with respect to any other insurance policy issued to the additional insured, and such other insurance issued to the additional insured as a named insured shall be excess and/or noncontributing, whichever applies, with this insurance; and

2. Any insurance provided by this insurance shall be primary to other valid and collectible insurance available to the additional insured except:

a. As otherwise provided in the COMMON POLICY CONDITIONS, H. OTHER INSURANCE; or

b. For any other valid and collectible insurance available to the additional insured by attachment of an endorsement to another insurance policy. In such case, the coverage provided under this insurance shall also be excess.

(A copy of the Farm Family Policy Primary and Noncontributory Insurance endorsement is in included in Exhibits "4" and "6" attached to the Vinciguerra Aff.).

C. The Underlying Action

On or about May 28, 2015, underlying plaintiff Joseph Giampa commenced the underlying action against the Tendering Parties. (A copy of the summons and complaint in the underlying action is attached to the Vinciguerra Aff. as Exhibit "1"; see also, Preliminary Pre-Trial Statement, §b, Docket Entry No. 11). Mr. Giampa alleges he sustained bodily injury on January 13, 2014, when he was injured at the project site while in the course of his employment with Mastercraft. Specifically, in the underlying complaint, Mr. Giampa alleges:

¶70. That at all relevant times hereinafter mentioned, plaintiff was an employee of Mastercraft Masonry I, Inc.

* * *

¶78. That as a result of the aforesaid negligence of defendants and the dangerous and defective condition, plaintiff, lawfully traversing the interior stairway at the aforesaid lands and/or premises and/or construction site on January 3, 2014, was caused to be injured and suffered permanent and severe personal injuries without any fault or negligence on plaintiff's part contributing thereto.

The underlying action asserts causes of action alleging negligence in the ownership, maintenance, operation, and control of the project site, as well as violations of New York Labor Law §§ 200 and 241(6) and Article 23 of the Industrial Code.

Arch accepted the tender and has been providing a defense to Mega, East 138th Street and Barrier Free Living in the underlying action. Mastercraft was impleaded into the underlying action as a third-party defendant by the Tendering Parties, alleging causes of action sounding in contractual indemnification and breach of contract to procure insurance. Farm Family retained counsel and is defending Mastercraft in the underlying action.

D. Arch's Repeated Tenders to Farm Family

By correspondence dated January 24 and February 6, 2014, Arch provided Farm Family with a notice of claim and demand for indemnification of Mega in connection with the events of the underlying action. Farm Family failed and refused to respond to either notice of claim.

Thereafter, by correspondence dated June 12, June 15 and August 4, 2015, Arch tendered the defense and indemnification of all the Tendering Parties to Farm Family. Farm Family again failed and refused to respond any of the three tenders.

By correspondence dated September 17, 2015, Arch, by counsel retained to represent the Tendering Parties in the underlying action, once more tendered the defense and indemnification of the Tendering Parties to Farm Family. On October 22, 2015, Farm Family finally acknowledged the tender by counsel for the Tendering parties, but declined to provide the requested defense and indemnification purportedly because it was "premature" and "additional discovery is needed." (Copies of the various Arch tenders and the Farm Family response are attached to the Vinciguerra Aff. as Exhibits "7" through "14", respectively). No explanation was provided as to what "additional discovery" would be required to ascertain either Farm Family's defense and/or indemnification requirements as to the Tendering Parties in the underlying action.

E. The Declaratory Judgment Action

Arch commenced this action by filing a Summons and Complaint on about December 28, 2015. The complaint alleges three causes of action seeking a determination of the rights and obligations of Arch and Farm Family with respect to their liability insurance coverage obligations owed to the Tendering Parties in the underlying action, including a declaration that Farm Family is obligated to defend and indemnify the Tendering Parties in the underlying action, and that Farm Family's coverage applies on a primary basis, while Arch's coverage, if at all applicable, is excess; a declaratory judgment that Farm Family is obligated to reimburse Arch for the attorneys' fees and defense costs it has incurred, plus any indemnity payments, on behalf of the Tendering Parties in the underlying action; and a money judgment in favor of plaintiff Arch and against defendant Farm Family, in the amount of the attorneys' fees and defense costs, plus any indemnity payments Arch has incurred on behalf of the Tendering Parties in the underlying action, in an amount to be determined by the Court. (A copy of the Complaint is attached to the Curtis Dec. as Exhibit "1"). Farm Family filed and served an Answer to the Complaint on or about February 11, 2016. (A copy of the Answer is attached to the Curtis Dec. as Exhibit "2"). (The parties stipulated on April 8, 2016 to amend the name of Farm Family Insurance Company to Farm Family Casualty Insurance Company.)

Thereafter, the Court issued the Scheduling Order. The Scheduling Order directed that dispositive motions must be served and filed by August 31, 2106, scheduled a final pre-trial conference for November 4, 2016, and provided dates for other discovery and related pre-trial matters (A copy of the Scheduling is attached to the Curtis Dec. as Exhibit "3").

ARGUMENT

I. ARCH IS ENTITLED TO SUMMARY JUDGMENT ON ALL ITS CLAIMS

A. Standards for Motion for Summary Judgment

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). There is no issue of material fact where the facts are irrelevant to the disposition of the matter. Speculation, conclusory allegations and mere denials are not enough to raise genuine issues of fact. National Union Fire Ins. Co. of Pittsburgh, Pa. v. Walton Ins. Ltd., 696 F.Supp. 897, 900 (S.D.N.Y. 1988). The burden lies with the moving party to demonstrate the absence of any genuine issue of material fact and all inferences and ambiguities are to be resolved in favor of the non-moving party. See Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Hotel Employees & Rest. Employees Union, Local 100 of New York, N.Y. & Vicinity, AFL-CIO v. City of New York Dep't of Parks & Recreation, 311 F.3d 534, 543 (2d Cir. 2002). If "no rational jury could find in favor of the nonmoving party because the evidence to support its case is so slight, there is no genuine issue of material fact and a grant of summary judgment is proper." Gallo v. Prudential Residential Servs., Ltd. Partnership, 22 F.3d 1219, 1224 (2d Cir. 1994).

"Although on summary judgment the court must draw all inferences in favor of the non-moving party, the fact remains that the burden is on the insurer to establish an exclusion under an insurance policy applies. Liberty Mut. Ins. Co. v. Zurich Am. Ins. Co., 2014 U.S. Dist. LEXIS 42471, *10 (S.D.N.Y. March 28, 2014), citing Ment Bros Iron Works Co., Inc. v. Interstate Fire & Cas. Co., 702 F.3d 118, 121 (2d Cir. 2012) (citing Consol. Edison Co. of N.Y., Inc. v. Allstate Ins. Co., 98 N.Y.2d 208, 220, 746 N.Y.S.2d 622) ("Generally, it is for the insured to establish coverage and for the insurer to prove an exclusion in the policy applies to defeat coverage."). Under New York law, "policy exclusions are given a strict and narrow construction, with any ambiguity resolved against the insurer." Id. (internal citations omitted).

B. The Tendering Parties are Additional Insureds On the Farm Family Policy and are Entitled to a Defense and Indemnification in the Underlying Action

In this instance, there is absolutely no question that each of the Tendering Parties is an Additional Insured on the Farm Family Policy. As set forth above, Barrier Free Living was added as an additional insured to the Farm Family Policy by an Additional Insured – Designated Person or Organization endorsement. (See Vinciguerra Aff. Exhibit "6"). Similarly, East 138th Street and Mega were added as additional insureds by Additional Insured – Owners, Lessees or Contractors – Scheduled Person or Organization endorsements. Id. The Tendering Parties are also listed on the Farm Family Policy's Additional Insured Schedule, including references to premiums paid by Mastercraft to add such parties to the policy. Id.

Therefore, pursuant to the policy's express terms, in order for East 139th Street, Barrier Free Housing, and Mega to qualify as additional insureds on the Farm Family policy, the plaintiff's injuries in the underlying action simply must have been "caused, in whole or in part," by Mastercraft's acts and omissions in the performance of its operations.

C. The Tendering Parties Qualify as Additional Insureds On the Farm Family Policy and Farm Family Has No Basis to Deny Them Defense and Indemnification

Although Farm Family has thus far failed and refused to formally articulate its basis for not accepting the various tenders, its comments that such tenders were "premature" and "additional discovery is needed" suggest that it believes Mr. Giampa's injuries might not have been "caused, in whole or in part" by Mastercraft.[2] In light of the allegations in the underlying action, such a position clearly misconstrues and misapplies relevant New York law

New York courts have held that "caused by" has the same meaning as "arising out of." National Union Fire Ins. Co. of Pittsburgh, PA v. Greenwich Ins. Co., 103 A.D.3d 473, 962 N.Y.S.2d 9 (1st Dept. 2013); W & W Glass Sys., Inc. v. Admiral Ins. Co., 91 A.D.3d 530, 937 N.Y.S.2d 28 (1st Dept. 2012); Shawmut Woodworking & Constr. v. Harleysville Ins. Co. of N.Y., 2014 N.Y. Misc. LEXIS 972 (N.Y. Sup. Ct. Mar. 6, 2014); Hotels AB, LLC v. Permasteelisa, CS, 2013 N.Y. Misc. LEXIS 4154 (N.Y. Sup. Ct. Sept. 11, 2013). The New York Court of Appeals has "interpreted the phrase 'arising out of' in an additional insured clause to mean 'originating from, incident to, or having connection with.'" For coverage to become available under such a term requires proof only of "'some causal relationship between the injury and the risk for which coverage is provided.'" In determining whether an injury "arose out of" an insured's work, "the focus of the inquiry 'is not on the precise cause of the accident but the general nature of the operation in the course of which the injury was sustained.'" Regal Constr. Corp. v. National Union Fire Ins. Co. of Pittsburgh, PA, 15 N.Y.3d 34, 904 N.Y.S.2d 338 (N.Y.

[2] Although counsel for Farm Family has similarly not clearly and specifically explained the bases for refusal of the tenders, during the parties' discussions to informally resolve this matter pursuant to the Court's Individual Practice Rules and Scheduling Order, counsel for Farm Family suggested Mr.Giampa's injuries occurred prior to the start of normal working hours, despite Mr. Giampa's own explicit enumerated allegations in the complaint in the underlying action that he was injured in the course of his employment, or any remotely plausible explanation as to why he would be at the construction site apparently performing his usually duties if not engaged in work.

2010), quoting Maroney v. New York Cent. Mut. Fire Ins. Co., 5 N.Y.3d 467, 472, 805 N.Y.S.2d 533 (N.Y. 2005). "Generally, the absence of negligence, by itself, is insufficient to establish that an accident did not 'arise out of' an insured's operations." Worth Constr. Co., Inc. v. Admiral Ins. Co., 10 N.Y.3d 411, 416, 859 N.Y.S.2d 101 (N.Y. 2008)[3]; Strauss Painting, Inc. v. Mt. Hawley Ins. Co., 105 A.D.3d 512, 963 N.Y.S.2d 197 (1st Dept. 2013), mod on other grounds 24 N.Y.3d 578, 2 N.Y.S.3d 390 (N.Y. 2014) (a finding of negligence against the named insured is not required to support additional insured coverage where the additional insured endorsement speaks in terms of acts or omissions, not negligence).

Most significantly, where "*the loss involves an employee of the named insured, who is injured while performing the named insured's work under the subcontract, there is a sufficient connection to trigger the additional insured 'arising out of' operations' endorsement and fault is immaterial to this determination.*" Hunter Roberts Const. Group, LLC v. Arch Ins. Co., 75 A.D.3d 404, 904 N.Y.S.2d 52 (1st Dept. 2010) (emphasis added); See also Liberty Mut. Ins. v. Zurich, supra, (injury incurred by an individual acting on behalf of the named insured necessarily arose out of the named insured's ongoing operations); HBE Corp. v. Harleysville Grp., Inc., 2015 U.S. Dist. LEXIS 131972 (N.D.N.Y Sept. 30, 2015) ("The Court therefore concludes that under New York law, the condition set forth in the Additional Insured Endorsement is satisfied by HBE's undisputed showing that the Toth action arose out of an accident that occurred while

[3] In Regal Constr. Corp., the Court of Appeals distinguished Worth, stating: "Here, there was a connection between the accident and Regal's [contractor/named insured's] work, as the injury was sustained by Regal's own employee while he supervised and gave instructions to a subcontractor regarding work to be performed. That the underlying complaint alleges negligence on the part of URS [construction manager/additional insured] and not Regal is of no consequence, as URS's potential liability for LeClair's injury "ar[ose] out of" Regal's operation and, thus, URS is entitled to a defense and indemnification according to the terms of the CGL policy" (15 N.Y.3d at 39, 2010 NY Slip Op 4661, at *4). See also Wausau Underwriters Ins. Co. v. Old Republic Gen. Ins. Co., 2015 U.S. Dist. LEXIS 103954 (S.D.N.Y. Aug. 7, 2015) ("Applying Regal Construction, lower courts in New York have held that, where a person is acting on behalf of the named insured, 'it is not necessary to try the issue of causation' prior to concluding that the relevant injury arose out of the named insured's ongoing operations").

Toth was performing work on behalf of Demco in the performance of Demco's ongoing operations for HBE."); Auriemma v. Biltmore Theatre, LLC, 82 A.D.3d 1, 917 N.Y.S.2d 130 (1st Dept. 2011); Longwood Central School District v. American Employer's Ins. Co., 35 A.D.3d 550, 827 N.Y.S.2d 194 (2d Dept. 2006); Zurich Am. Ins. Co. v. Burlington Ins. Co., 2016 N.Y. Misc. Lexis 1129 (N.Y. Sup. Ct. April 4, 2016) (plaintiff need only allege he was injured while lawfully on the premises as an employee of insured to trigger additional insured's entitlement to defense in the underlying action).

The First Department's liberal and expansive interpretation of the phrases "caused by," "acts and omissions" and similar language in additional insured endorsements is current, long-standing, undeniable and near absolute. See, e.g., Kel-Mar Designs, Inc. v. Harleysville Ins. Co. of N.Y., 127 A.D.3d 662, 8 N.Y.S.3d 304 (1st Dept. 2015) (additional insured coverage triggered where named insured's employee lost his footing on a stairway while working on a construction project because his injuries resulted, at least in part, from his "acts or omissions" (his loss of footing while on the stairway) while performing his work, regardless of whether he was was negligent or otherwise at fault for his mishap).

In sum, as long as the plaintiff was injured during the course of his employment with the named insured, the plaintiff's injuries will virtually always be deemed to have arisen from the named insured's operations. In this instance, plaintiff in the underlying action expressly alleged he was injured during the course of his employment with Mastercraft at the project site, therefore his injuries necessarily "arose out of" or were "caused, in whole or in part, by" Mastercraft. East 139th Street, Barrier Free Housing and Mega thus unquestionably qualify as additional insureds on Mastercraft's insurance policy entitling them to defense and indemnification in the underlying action from Farm Family.

Any attempt by Farm Family to distinguish plaintiff's particular conduct or circumstances as being so far removed or incidental to the insured's work as to form an effective exception to established law is both futile and unpersuasive. The state's broad view on this subject is so pervasive and near absolute that New York courts have also consistently held that even activities at the job site that are merely incidental to the actual work being performed still "arise out of" such work. See, e.g., Hunter Roberts Const. Group, supra, (additional insured coverage triggered where employee of named insured fell into a hole while walking back to a field office to obtain a can of paint); Sandy Creek Cent. School Dist. v. United Nat. Ins. Co., 37 A.D.3d 812, 831 N.Y.S.2d 465 (2d Dept. 2007) (additional insured coverage triggered where employee of named insured was injured in parking lot of construction site while heading toward his vehicle for lunch break); Chelsea Assocs. LLC v. Laquila–Pinnacle, 21 A.D.3d 739, 801 N.Y.S.2d 15 (1st Dept. 2005) (additional insured coverage triggered where employee of named insured was injured while entering job site en route to work); Turner Construction Co. v. Pace Plumbing Corp., 298 A.D.2d 146, 748 N.Y.S.2d 356 (1st Dept. 2002) (additional insured coverage triggered where employee of named insured was injured while using restroom facilities at the job site).

The First Department's expansive view of "caused by" and related language is even so significant and permissive that it recently applied it where a loss did not involve an injury to an employee of the named insured subcontractor. Burlington Ins. Co. v. NYC Tr. Auth., 132 A.D.3d 127, 14 N.Y.S.3d 377 (1st Dept. 2015). There, the New York City Transit Authority ("NYCTA") was found to be an additional insured on a policy issued to a subcontractor in connection with an injury sustained by an employee of the NYCTA when a piece of the subcontractor's machinery exploded, even though the injuries were the result of the NYCTA's negligence rather than the named insured subcontractor's. The trial court granted summary judgment to the subcontractor's carrier but the First Department reversed that decision, holding, "In at least three decisions issued within the three years before this appeal was argued (although not cited by the parties), this Court has held that, where a policy endorsement (like the ones here at issue) extends coverage to additional insureds for losses 'caused by' the named insured's 'acts or omissions' or 'operations,' the existence of coverage does not depend upon a showing that the named insured's causal conduct was negligent or otherwise at fault." Burlington, 132 A.D.2d at 135 (citing W&W Glass, Kel-Mar, and Liberty Mutual, supra).

It is anticipated that Farm Family may now first contend that plaintiff's injuries were somehow not "caused, in whole or in part," by Mastercraft's ongoing operations due to an alleged lack of negligence by Mastercraft or because plaintiff was purportedly engaging in limited or incidental activities such as arriving or departing from work, using the restroom, going to lunch or breakfast, etc. However, as detailed above, and without consideration of plaintiff's clear and explicit allegations in the underlying complaint concerning his employment, duties and injury, such incidental activities still provide a more than sufficient nexus that they will be construed as "caused, in whole or in part," by the insureds operations to trigger the relevant Farm Family Policy additional insured endorsement, and require Farm Family to immediate assume the defense and indemnification of the Tendering Parties.

II. THE COURT SHOULD STAY THE ACTION AS THE MOTION FOR SUMMARY JUDGMENT WILL OBVIATE ENTIRELY THE NECESSITY OF A TRIAL IN THIS MATTER

Fed. R. Civ. Pro 26(c) provides a court with broad discretion to stay discovery for "good cause." "Factors relevant to the court's determination of "good cause" include: the pendency of dispositive motions, potential prejudice to the party opposing the stay, the breadth of discovery sought, and the burden that would be imposed on the parties responding to the proposed discovery." Anthracite Capital BOFA Funding, LLC v. Knutson, 2009 U.S. Dist. Lexis 112551

(S.D.N.Y. Dec. 3, 2009) (Judge Swain). This Court additionally specifically provided in Section 3 of the Scheduling Order that a dispositive motion that would obviate the need for a trial of the matter is appropriate grounds for a request for a stay in connection with such motion.

As detailed, above, Arch has moved for a judgment on the merits on all its causes of action. A determination in Arch's favor will resolve all issues currently before this Court in the action. It is also Arch's position that the documentary and other evidence now before the Court are sufficient to resolve the motion for summary judgment without need for discovery or further proceedings.

To the extent Farm Family might oppose Arch's request for a stay of discovery and any pertinent deadlines set forth in the Scheduling Order, Arch respectfully submits that Farm Family would incur no prejudice from a stay. Arch is currently representing all Tendering Parties, and Farm Family is representing Mastercraft, its insured, in the underlying action, such action is still in the early stages of discovery, and to date Farm Family has never raised any issues concerning how and when this declaratory judgment action might adversely impact the various parties' positions in the underlying action. Further, no discovery requests in this action have thus been exchanged between Arch and Farm Family beyond material accompanying the motion hereto or pleadings and discovery in the underlying action readily and easily available to both Arch and Farm Family outside the discovery process. Similarly, it is not expected that any expert discovery will be necessary to resolve this matter even with an adverse determination of Arch's motion for summary judgement.

Accordingly, Arch respectfully requests that the Court stay all discovery and other dates in the Scheduling Order in the interests of judicial and economic efficiency, fairness, and lack of prejudice to any party.

CONCLUSION

For the foregoing reasons, it is respectfully requested that an Order be issued staying the within action and granting plaintiff Arch Specialty Insurance Company's motion for summary judgment in its entirety, issuing declarations as follows:

1) that the Tendering Parties qualify as additional insureds on the Farm Family Policy with respect to the underlying action and, therefore, Farm Family is obligated to defend and indemnify the Tendering Parties in the underlying action;

2) that Farm Family must reimburse Arch for the attorneys' fees and defense costs incurred on behalf of the Tendering Parties in the underlying action; and

3) directing the entry of a money judgment in Arch's favor against Farm Family for $29,744.02;

4) together with such further relief as the Court deems just and proper.

Dated: New York, New York
July 19, 2016

KELLY & CURTIS, PLLC

By: ______________________
ADAM B. CURTIS (1794)
Attorneys for Plaintiff
ARCH SPECIALTY INSURANCE COMPANY
32 Broadway, Suite 301
New York, New York 10004
(212) 248-2200
adam.curtis@kellyandcurtis.com